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No. 1094. 103

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

RALPH REA, ET AL.,
Petitioners,

vs.

WILLIAM B. DEVANNEY, ET AL.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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We earnestly contend that petitioners' petition should be dismissed at this time, and an end put to the five years' litigation begun by a grandnephew of M. P. Murnan, seeking to partition the real estate of M. P. Murnan and quiet the title against the widow, who had been the wife of M. P. Murnan for twenty-two years prior to his death.

There is no federal question of substance in this case, only a plausible appearance premised upon a most distorted statement of evidence, pleadings and procedure.

A **true** perspective of the case may be obtained from the three opinions of the Court of Appeals, reported consecutively in the **46 Northeastern, 2nd Series,** beginning respectively at pages 649, 664 and 667. For the convenience of the court, and as a reading thereof will, we believe, convince the court of the total lack of merit of the petitioners claims, we print herewith the opinion upon the merits as Appendix I, the opinion overruling the motion for a new trial and incorporating findings of fact and conclusions of law as Appendix II, and the opinion overruling the motion to vacate the judgment upon the ground of lack of jurisdiction as Appendix III.

"SUMMARY STATEMENT."

Under this heading what they label as a brief statement of undisputed facts is a most distorted statement. For a fair review of the evidence we refer to the Court of Appeals opinion, Appendix I, page 40 to 76, infra.

On November 7, 1912, the then Mrs. Grace Backenstoe obtained a decree of divorce from her long-absent first husband, George Backenstoe, in the Court of Insolvency of Cuyahoga county, a court of record having concurrent jurisdiction with the Common Pleas Court in divorce and alimony cases (**Addams, Judge, v. State,** 104 O. S., 475). In the decree the court determined that it had jurisdiction of the subject matter and of the defendant by service by publication. The decree was never questioned by the defendant, directly or indirectly. During the taking of the testimony in the Court of Appeals these petitioners pre-

sented a transcript of papers now in the files of said case, including an affidavit for service by publication sworn to before a notary of the same name as the attorney of record. No identification was attempted. This Honorable Court refused a writ in a case involving the identical question, the Court of Appeals of Cuyahoga county having held that the irregularity made the judgment voidable and subject only to direct attack by the defendant **(Hudson, Adm., v. Owens**, 28 Ohio Law Reporter, 221; 280 United States, 571).

M. P. Murnan became interested in Grace Backenstoe in 1914 or 1915, but the obstacle to their marriage in Columbus was the fear of the affect on his taxicab business of public association of his name with her sporting house. In July, 1915, he arranged an automobile trip, ostensibly for the purpose of visiting the San Francisco World's Fair, including in the party Grace Backenstoe, Homer Byers and Tommy Stevens. On the return trip, to avoid a crossing of the Great American Desert between Barstow, California, and Flagstaff, Arizona, for Grace, who had been sick, Murnan and Mrs. Backenstoe went by train from Barstow to Flagstaff. Murnan took advantage of their arrival ahead of the car to secure a license, and they were married by the justice of the peace at Flagstaff.

Upon the arrival of the car, Byers, being informed by the garage keeper, took Tommy Stevens and went to the court house to verify the report, not daring to question Murnan, and was shown the original marriage license and certificate in a basket on the clerk's desk. His recollection after twenty-five years was of those things which would likely impress one under his circumstances. He remembered the state seal of Arizona and the signature of the clerk upon the upper part of the document; he identified the signatures

of the "contracting parties" upon the lower part of the document, although surprised at the name of "Grace Daugherty," the maiden name to which Mrs. Backenstoe had been restored by the divorce decree.

The clerk failed to copy the license and the certificate into the permanent record, but the looseness of the practice in this regard was developed in the deposition taken by us of the present clerk, Mary P. Lewis (Vol. IV, page Z-44). This looseness is commented upon by the Court of Appeals in its opinion, Appendix I, and in its fourteenth finding of fact, Appendix II. The difficulty of proof after twenty-five years is evidenced by the death of the justice of the peace, the disappearance of the then clerk of court, and the deaths of all members of the automobile party except Homer Byers. It was the practice for the clerk to return the license and certificate to the parties after he had had an opportunity of copying them in the record, and during the following fall it was shown by Mr. and Mrs. Murnan to Louis Novario, Cleveland politician and their mutual friend, after Mrs. Murnan's suggestion that "we can trust Louis."

Thereafter, to business associates and friends, Murnan boasted that he had married the richest woman in Columbus, and that he need now have no fear of gambling losses. They told their close friends of their marriage with the warning against publication because of the fear of the affect of publicity on Murnan's taxicab business. Mrs. Murnan gave him large sums of money, whenever he asked for it, and when she sold her South Front Street house to the F. & R. Lazarus department stores for $52,000.00, she took out a building permit and used the entire $52,000.00 in building a large investment building on Murnan's North High Street lots, one of the most valuable properties in his present estate.

Without taking further time to outline the vast amount of testimony in relation to their conduct as husband and wife, constituting almost three volumes of testimony, which is undisputed except for deeds given during the first few years while Mrs. Murnan owned the questionable house, we refer to the brief summary of this evidence in the Court of Appeals' fifteenth finding of fact, Appendix II, as follows

> "The fact of said ceremonial marriage is corroborated from the date thereof by repeated statements and admissions of the said Maurice P. Murnan, as well as of the said Grace D. Murnan, as to said marriage in Arizona to close friends and associates, by their conduct and constant association together, and by the reputation of the marriage among their friends and associates following July, 1915; and after August, 1919, when they purchased and went to live at Graceland, the large showplace on North High Street, by their general reputation as man and wife, their constant declarations of their marriage, their deeds and conveyances as man and wife, their recognition of mutual interests in each other's property and **by all of their conduct until the death of Maurice P. Murnan on May 12, 1937.**"

"STATEMENT OF CASE."

Under this heading counsel seek to establish the **false premise** that the case was tried as an action at law in ejectment. Their repeated statements to this effect, and concessions attributed to these respondents and to the trial courts are absolute misrepresentations, as we will prove conclusively later in this brief.

The petition was carefully drawn to seek equitable remedies only, namely, partition, the quieting of title and equitable accounting. It denied that there was any adequate

remedy at law, and carefully avoided any allegation of wrongful possession, the essential element of an action in ejectment. The answers, filed by Mrs. Murnan and two nieces of Mrs. Murnan, took issue only with the claim of this grandnephew that he was an heir of M. P. Murnan, alleging that Grace Murnan was the surviving spouse and **sole** heir and asking that the petition be dismissed.

Upon the second trial in the Common Pleas Court, after the death of Mrs. Murnan, the trial judge sitting upon the chancery bench, found in favor of the petitioners upon the marriage question. In his opinion overruling the motions for a new trial, and making findings of fact and law (Transcript, page 75, et seq.), he pointed out that the remedies sought were partition, the quieting of title and equitable accounting, and in his conclusions of law found the petitioners entitled "to a decree quieting the title," etc., "to a decree in partition," etc., and "to a decree in accounting for the rents and profits," etc., and to these remedies only. Judgment was entered accordingly on August 22, 1940, with a finding in the accounting against Raymond W. Kilbourne, as executor under Mrs. Murnan's will.

Separate appeals were filed by Mrs. Murnan's heirs, including Margaret Lunn, niece of M. P. Murnan. Motions were made by these petitioners to dismiss the appeals on the sole ground that adequate bonds had not been given, and the motions were overruled by unanimous decision of the Court of Appeals on February 25, 1941. (Transcript, page 100, et seq.). By entry of April 22, 1941 (Transcript, page 108), it was stipulated that testimony be taken as upon deposition, and that either side could offer the testimony of witnesses, who had testified in the Common Pleas Court. Almost all of this latter testimony was offered and constituted Vol. I of the record. Vols. II and III

consist of new testimony introduced by the respondents, and Vol. IV consists of exhibits of both sides and two witnesses offered by the petitioners.

The decision of the Court of Appeals was filed March 12, 1942, and is attached hereto as Appendix I.

The majority opinion, written by Judge Barnes, contains an able and conscientious discussion of every question presented; and finds (1) that the burden of proof was upon this distant relative to prove that there was no surviving spouse; (2) that the Backenstoe divorce decree was not subject to collateral attack because of alleged irregularity, being voidable only upon direct attack by the defendant therein, following **Hudson, Adm., v. Owens**, an unanimous opinion by the Court of Appeals of Cuyahoga county on the identical question (28th Ohio Law Reporter, 221), in which case this Honorable Court denied the petition for a writ (280 United States, 571), after the Ohio Supreme Court had denied a motion to certify (28 Ohio Law Reporter, 475); (3) that Grace Daugherty (Backenstoe) had been ceremonially married to M. P. Murnan at Flagstaff, Arizona, about July 15, 1915; (4) that under the laws of Arizona the alleged irregularities did not render the marriage invalid; (5) that, if such had been the case, the intention of the parties, expressed at such ceremony, would be imputed to the subsequent cohabitation to constitute an Ohio common law marriage under the decision of the Supreme Court of Ohio in **Johnson v. Wolford**, 117 O. S., 136.

Judge Gieger concurred in all of these conclusions, and went a step farther, namely, that the evidence was sufficient to support a conclusion of common law marriage under the laws of Ohio, even if there had been no ceremonial marriage, and concluded his concurring opinion, as follows (Appendix I, page 71):

> "I am of the opinion that the evidence produced might well establish either a ceremonial or a common law marriage and, therefore, I concur in the opinion so holding.
>
> "I likewise concur on all other questions."

Judge Hornbeck concurred in sustaining the divorce, but dissented on the question of marriage. After stating that the rule as to burden of proof did not affect his conclusion, he inconsistently concluded his opinion as follows (Appendix I):

> **"The record may not be read without the impression that Pat and Grace were married,** but an analysis of the essentials of proof will not, in my judgment, permit of the determination that they were married in any form recognized in the law."

On March 15, 1942, petitioners filed their motion for a new trial and for findings of fact and conclusions of law. Under the requirements of Rule 9 of the Court of Appeals, they prepared their desired findings of facts, which were duly submitted with our objections. The Court of Appeals found these so inconsistent with its decision that it adopted others, eighteen in number, in a per curiam decision filed on April 7 (Appendix II, infra). These findings fully satisfied the petitioners' right under the statutes and laws of Ohio to findings of "the ultimate facts of the controversy, and all probative facts, from which ultimate facts can be inferred **as a matter of law.**" (39 Ohio Jur., 1204.)

The petitioners did not stand on their first request, but thereafter until June 2 bombarded the court with Professor Quiz lists of questions on irrelevant or probative facts not necessary to the court's conclusions on the ultimate facts. The court's patience, however, seemed unlimited and they invited counsel to submit their suggestions incorporated

in a judgment entry form. The court then adopted with some modifications the form submitted by the petitioners, including therein unnecessary findings reflecting upon the prior conduct and business of the Murnans. In this entry the petitioners attempted to jockey Judge Gieger into the position of finding common law marriage only, instead of his actual finding that the evidence was sufficient to prove either form of marriage, as stated in his original opinion and in the per curiam finding of facts of April 7 (Appendix II). To their words "this establishes a common law marriage between the parties" (finding eighteen), the court added the words "but might well corroborate a ceremonial marriage."

The judgment entry was filed June 6, 1942, and on June 30 the petitioners filed a motion to vacate the judgment, in which they for the first time made the claim that the allegations of their petition as to Mrs. Murnan constituted a cause of action in ejectment, and not an action to quiet title.

This motion was overruled in the opinion written by Judge Hornbeck filed July 27, which we attach as Appendix III. Therein is pointed out petitioners' misconception of the jurisdiction of the Court of Appeals as to subject matter, and that the claim of an action in ejectment was then made for the first time.

Upon these facts the Supreme Court of Ohio dismissed on December 16, 1942, the petitioners' appeal as of right for the reason that "no debatable constitutional question is involved." (Rea, Appellant, v. Fornan, et al., 140 O. S., 546). After repeated applications for a rehearing, the case was reheard but the court adhered to its original conclusion (141 O. S., 476).

THE PETITIONERS' QUESTIONS.

Instead of following through the maize of petitioners' brief and its reiterations, we will treat separately the four questions, which seem to be the sum of their contentions: (1) Were petitioners denied due process by the trial de novo of the case by the Court of Appeals? (2) Did the Court of Appeals fail to give full faith and credit to the laws and records of Arizona by its finding of marriage? (3) Did it deny petitioners due process by failing to make certain findings of fact and law? and (4) were petitioners denied due process by the denial of a collateral attack upon the divorce decree of November, 1912?

THE PETITIONERS WERE NOT DENIED DUE PROCESS BY THE TRIAL DE NOVO OF THIS CASE BY THE COURT OF APPEALS—NATURE OF ACTION, AND JURISDICTION OF COURT OF APPEALS.

The petitioners repeatedly assert in their petition and brief that this case was heard as an action at law in ejectment in the Court of Common Pleas and the Court of Appeals, and was so considered and treated by judges and counsel; and that consequently the Court of Appeals had no jurisdiction of the **subject matter** to hear the case de novo, the judgment accordingly being void and the petitioners denied "due process."

Even if this were an action at law, in Ohio it is well settled that the Court of Appeals has jurisdiction under the Ohio Constitution of 1912 of the subject matter of **every** case decided in the Common Pleas Courts, and that the question of the mode of trial is **not** one of jurisdiction of

the **subject matter making the judgment void.** The Ohio rule is well stated in the opinion of the Court of Appeals overruling a motion to vacate the judgment (Appendix III), as follows:

> "**Jurisdiction** is the power of a court to hear and determine a cause generally. **This court by the Ohio Constitution, is given capacity to entertain appeals on questions of law and fact,** general jurisdiction to determine the subject matter of such appeals and to pass upon and determine its own jurisdiction. The test of jurisdiction is the court's power to act at all, not the correctness of its decision in so acting.
>
> "We recognize that jurisdiction of the court of the subject matter may be raised at any time, even after judgment, but the test of jurisdiction of the subject matter is not so limited as contended by the appellees. Improvement Company v. Malone, 78 O. S., 238. The question is no longer an open one in Ohio, but has been decided adversely to the claims of appellees both before and since the Constitution of 1912. 2 Ohio Jur., 562-4; Drake v. Tucker, 83 O. S., 97; Cadwell v. Cadwell, 93 O. S., 23; The Trumbull Savings and Loan Company v. Saviers, et al., 115 O. S., 403; Union Trust Company v. Lessovitz, 122 O. S., 406; Habecker v. Houck, 16 Ohio Abs., 58."

Petitioners repeated assertions that this case was tried as an action at law in ejectment are directly contrary to the facts, as is shown by the following specifications:

(1) **Their** petition was carefully drawn to state equitable causes of action only, i. e., for **partition, the quieting of title,** and incidental **equitable accounting. It specifically disclaims any adequate remedy at law. They were careful not to claim that Mrs. Murnan was wrongfully in possession, or even that she wrongfully collected the rents and profits, but only that she refused to account after their collection, thus omitting the primary characteristic of an action of ejectment at law.**

For the convenience of the court we quote all of the allegations of the petition with relation to Mrs. Murnan, or Grace Backenstoe as there named. This petition, which is entitled "Petition in Partition," first recites that plaintiff, as a grandson of a half-brother of M. P. Murnan, inherited and is seized, as tenant in common, of a one-ninetieth part of his real estate; that other named grandnephews, et al., are Murnan's only heirs and next of kin; that the personal property is sufficient to pay the debts, and that plaintiff desires to have his interest in said premises set off to him in severalty, and then proceeds:

> "That since May 12, 1937, the defendant, Grace D. Backenstoe, who claims an interest in said premises, has been in possession thereof, collecting therefrom its rents and profits, has failed, neglected and refused to pay over, or in any manner account therefor and has threatened to and will continue to do so, to the irreparable injury of this plaintiff, **for which he is without an adequate remedy at law.**
>
> "Wherefore, plaintiff prays that he may have **partition** of the premises hereinbefore described, according to law; that the defendant, Grace D. Backenstoe **be required to set up** what interest, if any, she may have, in said premises and that **the same be declared null and void**; that this plaintiff may have **an accounting** of rents and profits issuing from said premises; that **a trustee ad litem be appointed** for the preservation of said premises and the rents and profits issuing therefrom; and that he may have such further relief in law and in equity as the court may deem just and proper in the premises."

(2) The petitioner's selection of equitable remedies, partition and the quieting of title, recognized by the well settled law of Ohio as chancery actions and appealable, was not questioned by the answers of Grace Murnan and the joint answers of Mary Fallon and Margaret Lunn, **nieces**

of M. P. Murnan and named by the plaintiff as joint tenants with him, each answer merely setting forth that Grace Murnan was the widow and **sole heir** of M. P. Murnan and asking that the petition be dismissed. As the Court of Appeals pointed out, the effect of such an answer "was to challenge the allegations of the petition that the plaintiff and the groups referred to in his petition were the heirs of Pat Murnan."

After Mrs. Murnan's death, when the action was revised by making her heirs party, the same two nieces of M. P. Murnan, as well as other heirs of Mrs. Murnan, filed answers, alleged again that Grace Murnan had been the widow and sole heir of M. P. Murnan and that they had an interest in the property under the terms of her will; denied generally the allegations of this petition and asked that it be dismissed.

Under these answers there could be no question but that the causes of action stood as framed by the plaintiff's petition.

(3) There was no demand for a jury trial in the Common Pleas Court; and there was no thought of one. The case, so clearly defined in equity by the petition, was sent by the assignment commissioner to the chancery room for trial and not to one of the civil jury rooms.

(4) Judge Turner, the common pleas judge who decided the case in favor of the plaintiff, specifically pointed out in his written opinion on the motion for new trial and the motion for findings of fact and law that this was an action for partition, for the quieting of title and an accounting, as follows (Opinion, page 1, Transcript, page 75):

> "Counsel for plaintiff has submitted two suggested findings of fact, in effect joining in the request for findings. Apparently, the request for a finding of facts

and conclusions of law was made without due regar
**to the issues in this case, which seek partition of sa
lands, the quieting of title thereto and an accountin
for rents and profits."**

In his conclusions of law at the end of the same opinio
Judge Turner, after finding that the title was in petitioner
allows the following remedies only:

"4. Plaintiff is entitled to a decree **quieting the tit**
to the real estate described in his petition in plainti
and the other next of kin of Maurice Patrick Murna
referred to in conclusion one last above.

"5. Plaintiff is entitled to a **decree in partition** of t
seventeen parcels of real estate in his petition describe

"6. The tenants in common referred to in conclusio
one last above, are entitled to a **decree in accountin**
for the rents and profits of the real estate described
plaintiff's petition, as follows:" * * *

**These same three remedies, and these only, appear in t
judgment entry as follows** (Transcript, page 88):

"4. The court further finds that Grace D. Murnan,
Grace D. Backenstoe, was not the widow of the sa
Maurice Patrick Murnan," * * *

"It is therefore ordered by the court that the clain
of the said Grace D. Murnan, sometimes also calle
Grace D. Backenstoe, Raymond W. Kilbourne, as h
executor, and the various heirs at law, and devisees
the said Grace D. Murnan, sometimes also called Gra
D. Backenstoe, to the real estate of the said Mauri
Patrick Murnan, the real estate described in the pe
tion herein, as set forth in their various pleadings, b
and the same hereby are denied and dismissed and t
title of the plaintiff and the defendants mentioned
paragraph 2 hereof, **is hereby quieted against the d
fendant, Grace D. Murnan**, also known as Grace Bac
enstoe, the heirs and devisees of the said Grace
Murnan and each and every one of them, and all pe
sons claiming under them, or any of them; and they a
hereby forever enjoined from setting up any claim
said premises or any part thereof, adverse to the tit

and possession of the said plaintiff and defendants, their heirs or assigns, thereto." * * *

"6. The court further finds that plaintiff, and defendants hereinafter named, are tenants in common in the real property described in the petition; that plaintiff, Ralph Rea, has a legal right to, and is seized in fee simple in an undivided 1/90th interest"; * * *

"7. It is therefore ordered, adjudged and decreed that **partition of said estate** be made in favor of plaintiff and defendants, in the proportion set forth in the preceding paragraph," * * *

"And it is ordered that **a writ of partition issue** to the sheriff of Franklin county, Ohio," * * *

There was no finding that Mrs. Murnan was wrongfully in possession of the property and no order to dispossess either in the conclusions of law or in the judgment.

(5) Contrary to their present claim, petitioners specifically argued in the Court of Appeals that their cause or causes of action were purely equitable. Their motion of January 6, 1941 (Transcript, page 75), to dismiss the appeal of law and fact, was upon the sole ground that it was not perfected by the giving of bonds in the amount required (Section 12223-6, General Code), "in that a judgment was rendered in the Common Pleas Court in favor of the plaintiff and others, appellees herein upon an **accounting in equity** in the sum of $18,056.02."

In their reply memorandum on this motion, they clearly state that the action was equitable in these words (page 4):

"There is and was no right to a money judgment in this case, except as it may exist and arise out of the decree establishing **in equity the right, title and interest in the real estate of the heirs of Maurice Patrick Murnan.** That money judgment is not rendered **in action for money only at law.** * * * **The parties were not entitled to a jury trial,** because the judgment arises from the right to an accounting **which can exist only in equity herein,** by reason of the fact that title, posses-

sion and profits belong to the heirs of Maurice Patrick Murnan."

(6) We have the disinterested finding of the Court of Appeals in the opinion overruling the motion to vacate, written by Judge Hornbeck who favored petitioners on the marriage question, that they did not claim the action to be one at law until after the final judgment entry (Appendix III):

> "The second and alternative motion seeks an order vacating our final judgment and the order overruling the motion of appellees to dismiss the appeal on questions of law and fact because this court had no jurisdiction to entertain the appeal as upon questions of law and fact. **The question has been voluminously briefed.**
>
> "The question now raised on this motion **was not at any prior time brought to the attention of the court. The suit of the appellees is in partition. They invoked such action in the Common Pleas Court and likewise in this court** and, subject only to the objection set forth in the motion to dismiss the appeal on questions of law and fact, **interposed no objection whatever to the jurisdiction of this court.**"

(7) It is not true that during the trial of the cause in the Common Pleas Court and the Court of Appeals, counsel for respondents conceded the action was at law in ejectment. Quite the contrary, when the question was first raised by petitioners' motion to vacate after judgment, we vigorously denied in several briefs both the right to raise the question at that time, and the contention that the chancellor in an action for partition and the quieting of title could not determine all questions relating to the remedies sought by them. As was said by Judge Hornbeck supra: "The question has been voluminously briefed."

We opposed these late contentions of theirs in our brief in the Supreme Court, dealing with questions of law, at pages 1-2 and 19-22, urging the **same** contentions as hereinbefore set forth.

All Causes of Action for Partition and the Quieting of Title Are Appealable in Ohio for Trial De Novo.

In Ohio it has been finally decided in the case of **Wagner v. Armstrong**, 93 O. S., 443, that **all partition cases are chancery cases and appealable**, whether involving (Opinion, page 459-460) "simple division of property among co-parceners" or "all other partition cases, wherein further rights and questions are to be determined"; and that this conclusion was "in line with the purpose of the Constitution makers" and **"only substantial justice that a de novo hearing be had, in cases where one man sitting as a court of equity has determined the issues."**

Syllabus 2:

> "All partition cases were originally cognizable in courts of chancery only and must still be regarded as chancery cases and therefore appealable under such terms and procedure as may be provided by law."

Opinion, pages 459-60:

> "It would be particularly unfortunate if the court should attempt to classify partition cases, saying some were and others were not appealable.
>
> "A case wherein simple division of the property among co-parceners is sought may be regarded as appealable. This being so, it follows as a matter of course that all other partition cases, where further rights and questions are to be determined, are likewise appealable.
>
> "We arrive at this conclusion without reluctance. Not only is it the law, but we feel it to be in line with the purpose of the constitution makers and not out of line with the principle of one trial and one review.

> This principle had its inception in the purpose of limiting to one review cases which had been tried by juries, where not only the trial judge, but twelve citizens of the state sitting as a jury, had determined the rights of the parties. In cases where one man sitting as a court of equity has determined the issues, it is only substantial justice that a de novo hearing be had."

It is the law of Ohio that **an action to quiet title** "is equitable in character and is considered as **an action in chancery**" (33 Ohio Jur., page 845); that it is "designed to suppress useless litigation and to prevent multiplicity of suits"; that "in such an action **all matters affecting the title** of the parties to the action may be litigated and determined" (page 847); and that being "of an equitable character, triable in chancery, **neither party has a right**, either statutory or constitutional, **to demand a jury trial**" (page 939).

In the case of Clark, et al., v. Clark, 110 O. S., 664, the Supreme Court of Ohio, having before it a cross petition for the quieting of title, held that such a petition **"indisputably"** constitutes a chancery case, and that a judgment thereon is appealable for trial de novo.

Syllabus:

> "2. When a defendant, in a proceeding to sell entailed real estate, files a cross petition seeking equitable relief under Section 11901, praying that **his title** to premises which are the subject of the proceeding **may be quieted** as against the other defendants, the **said cross petition states a chancery case and a judgment upon the issues set forth therein is appealable.**"

Opinion, page 654:

> "Taking up plaintiff in error's final argument, it is true that the cross petition filed in this case by Oliver H. Clark does state an equitable cause of action, in that it prays to have title to real estate quieted on be-

> half of the petitioner. **Such a petition indisputably constitutes a chancery case."**

In not a single case cited by petitioners was a cause of action to quiet title combined with an action for partition. In all a cause of action in ejectment presented the **paramount** issue with the necessary averment of wrongful possession and a prayer for an order of dispossession.

Even in that class of cases it is held that if one, whom plaintiff claims is a tenant in common with him, disputes his title, the issue may be tried as incidental to the action in partition. Here two nieces of M. P. Murnan filed answers denying his title, and one of them, Margaret Lunn, filed an appeal to the Court of Appeals, and is a respondent here.

Waiver.

These petitioners, by carefully framing their pleadings to state equitable causes only and trying them as such, waived any claim to another mode of trial, or to object after judgment against them.

In the case of Culver v. Rogers, 33 O. S., 537, tried as an equity case for injunction, although involving damages for trespass on land, without protest by **defendant** until after judgment against him, there is a good review by Chief Justice Johnson (Ohio) of the history of the practice in regard to the time and method of questioning the jurisdiction of a court of equity. The following is his particularly pertinent summary, and a quotation from Chief Justice Kent:

Opinion, page 542:

> "To permit the defendant to remain silent on this question, and by answer and trial to contest the case on its merits as a suit in equity, and then, after being defeated, to assign, in this court, as error, the de-

fective prayer of the petition, as a ground of reversa
comports neither with the terms nor with the scope
the civil code. Such a practice would tend to multip
actions, rather than to put an end to controversy. N
is it sustained by authority, either under present
former practice, where law and equity were admini
tered by distinct tribunals."

Opinion, page 543:

"In the same case (page 5) Kent, C. J., says: 'E
answering in chief, instead of demurring, he submitte
his defense to the cognizance of the court; and equi
will, and ought, in such cases, to retain the cause, pr
vided the court be competent to grant the relief, a
has jurisdiction of the subject matter.'" (Ludlow
Simond, 2 New York Cases).

How much more forcibly does this apply to the plainti
who selected the remedies and the forum!

Conclusion.

We submit, therefore, that there is not the slightest bas
for petitioners' claim that the judgment of the Court
Appeals was void and he was thereby denied "due proce
of law."

There was no cause of action at law in ejectment pr
sented by the pleadings or tried by the court. On the co
trary, he chose remedies cognizable in chancery and jud
ment was rendered accordingly. The defeated party
such a judgment has, under the settled law of Ohio, t
right to a trial de novo in the Court of Appeals.

Even if such were not the case, the Court of Appeals h
jurisdiction of the subject matter, and its judgment d
not constitute a denial of "due process." For the sa
reason his voluntary choice and waiver of the mode of tri

estopped him from objecting after judgment was entered against him.

THE COURT OF APPEALS' FINDING THAT GRACE MURNAN WAS THE SURVIVING SPOUSE OF M. P. MURNAN DID NOT CONSTITUTE A FAILURE TO GIVE FULL FAITH AND CREDIT TO THE LAWS OF ARIZONA.

The plaintiff below alleged in his petition that, **as grandnephew**, he was a next of kin and heir of M. P. Murnan, and as such entitled to have his one-ninetieth share of the property set off to him by the partition of Murnan's real estate, as well as to have his title quieted and an accounting for rents since the death of Murnan.

The plaintiff claimed under the sixth subdivision of the Ohio Statute of Descent and Distribution, **Section 10503-4, General Code**, which provides as follows:

> "(6) **If there is no spouse, no children or their lineal descendants, and no parents surviving**, to the brothers and sisters, whether of the whole or of the half blood of the intestate, or their lineal descendants per stirpes."

Not only was the burden of proof upon him as an ordinary plaintiff seeking relief, but **as a distant relative** the burden was upon him under this form of statute to show that there were no relatives of the decedent in the classes ahead, i. e., "no spouse, no children or their lineal descendants, and no parent." The uniformity of this rule lead the Court of Appeals to say that "the cases unequivocally support our conclusion that the burden of proof is upon the plaintiff in this instant case," citing **Sorenson v. Sorenson**, 68 Neb., 483, 94 N. W., 540, opinion by Judge Roscoe Pound, and twelve other cases (Appendix I, page 47).

Therefore, the question, which the Court of Appeals was called upon to decide, was: **Did plaintiff prove that at the time of Murnan's death in May, 1937, at Columbus Grace Murnan was not his "spouse"?**

To sustain his burden of proof the petitioner had to disprove three theories or premises supporting a conclusion of marriage, namely, (1) a valid ceremonial marriage at Flagstaff, Arizona, on July 15, 1915; (2) an invalid ceremonial marriage at Flagstaff, but from which "the intent and actual agreement to be married will be imputed by the law to the cohabitation" thereafter in Ohio, to constitute a common law marriage under the law of Ohio **(Johnson v. Wolford**, 117 O. S., 137); (3) without regard to a formal or informal ceremonial marriage in Flagstaff, a common law marriage under the law of Ohio founded upon their declarations, cohabitation as man and wife for 20 years, and the reputation of the marriage, which, "within the discretion of the court, may be sufficient to prove such marriage" (General Code of Ohio, Section 11989).

The fact that the court's conclusion is justified under either the second or third theory, proves conclusively that the question of giving full faith and credit to the laws and records of Arizona is not involved.

Judge Barnes in the majority opinion, as well as Judge Geiger in his concurring opinion, endorsed the second theory and the controlling Ohio case of **Johnson v. Wolford**, 117 O. S., 137, in the following discussion:

> "We take the following from Ruling Case Law, Vol. 18, 'Marriage,' Section 62: * * *
>
> 'An attempted ceremonial marriage in good faith entered into by one of the contracting parties, even though irregular or void will, through the actual agreement to be married and continuous cohabitation establish a valid marriage at common law.'

"This is the pronouncement of our Supreme Court in the case of Johnson v. Wolford, et al., 117 O. S., 136."

* * *

"* * * The evidence is very strong that Grace, at least, thought the marriage in Flagstaff was regular in every particular. She testifies that Pat attended to all the details. This means that he procured the license, secured the magistrate and took care of the papers. If there was any irregularity Pat might be in position to have knowledge thereof and Grace would not. We do not mean to say that there were any irregularities, but are merely canvassing the possibilities. **Mere irregularities, even though they might deny a ceremonial marriage, would not refute a common law marriage under the decision of our Supreme Court in the case of Johnson v. Wolford, 117 O. S., 136."** (Appendix I.)

In the **Johnson case** the facts and the principle of law involved are well stated in the syllabus, as follows (117 Ohio State, 137):

Syllabus:

"Where F., innocently and in good faith enters into a ceremonial marriage with J., which is void when contracted because J. has at the time a valid and subsisting contract of marriage with M., the removal of the impediment to such marriage by the death of M., and the continued cohabitation between F. and J., after the death of M., operate as a ratification and a validation of such marriage as to F. from the date of the death of M., though the death of M. may not have been known to F. and J.; **the intent and actual agreement to be married which inhered in the ceremonial marriage innocently contracted by F. will be imputed by the law to the cohabitation after the death of M. so as to establish a valid marriage at common law."**

At page 143 of the opinion, there is quoted a very pertinent and forceful statement from a New York case:

"In re Crandall's Estate, 214 App. Div., 363, 366, 212 N. Y. S., 210, 212, it was held:

> 'It makes no difference whether such decision is based upon the theory that the courts will infer a consent, or whether it is found as a fact from the conduct of the parties in holding each other out as husband and wife and occupying that relationship. The parties, during all those years, intended to live in lawful wedlock. **Courts will not be solicitous to find a way to nullify such intent and to make the relationship which the parties deemed lawful and sacred unlawful and immoral.'"**

The petitioners not only failed to disprove the defective-ceremony premise for the conclusion of marriage, as well as the ordinary common law marriage, **but failed also to prove that the ceremonial marriage of July 15, 1915, was invalid under the laws of Arizona.**

In support of this latter claim plaintiff relies (1) upon the testimony of Mrs. Murnan, taken upon deposition, that she recollects of only one witness to the marriage ceremony other than the officiating justice and the parties, (2) upon evidence that the clerk of Maricopa county, Arizona, failed to copy the license and certificate into the permanent record, in accordance with the direction of the statute, and (3) upon the fact that the original license could not be produced, although identified and described by two witnesses who saw it in 1915.

Under the Arizona statutes the absence of a permanent record of the license and certificate and the presence of one witness only did not render the marriage invalid, as is apparent from the following section of laws of Arizona in effect in 1915:

> "Section 3844. The common law that a marriage may be contracted by agreement of the parties without marriage ceremony is hereby abrogated, and no marriage contract within this state shall be valid **unless a license be issued as provided in this chapter, and a**

marriage solemnized by one of the persons authorized by law or by someone purporting to act in the capacity of a clergyman, judge or justice and believed in good faith, by at least one of the parties to be such."

The direct evidence supports these essential elements to validity, i. e., that the license was issued, and that the marriage was solemnized by the justice of the peace of Flagstaff, or one whom Mrs. Murnan believed to be the justice. (See Appendix I.)

As in many states where ceremonial marriage only is recognized, the Arizona statutes provide, as do the Ohio statutes, for proof of marriage otherwise than by proof of the record, which is not the best evidence. These statutes, offered in evidence by us as Appellants' Exhibits 15 and 16 (Vol. 4, pp. Z-150, 151) and incorporated by the Court of Appeals in its judgment entry as Finding No. 12, are as follows:

> **"Section 1762.** When the fact of marriage is required or offered to be proved before any court, evidence of the admission of such fact by the parties against whom the proceeding is instituted, or of general repute, or of cohabitation as married persons, or any other circumstantial or presumptive evidence from which the fact may be inferred shall be competent" **(1915 Laws of Arizona).**
>
> **"Section 23-316.** Marriage Certificates—Oral Proof of Marriage— * * * When the marriage is to be proved, evidence of the admission of such fact by the adverse party or of general repute, or of cohabitation as married persons, or any other evidence from which the fact may be inferred, shall be competent." **(Arizona Code of 1939.)**

The lapse of 25 years, the death of the justice of the peace, the disappearance of the clerk, and the death of all members of the automobile party but Homer Buyers, em-

phasizes the need of proof of this character. The three volumes of testimony offered by us, corroborated the direct proof of the ceremonial marriage beyond any doubt. This, the petitioners would now exclude from the court's consideration.

The **Legislature of Ohio** also prescribed a rule of evidence of this character, as follows:

> **"Section 11989, General Code.** Evidence of Marriage —Proof of cohabitation, and reputation of the marriage of the parties is competent evidence to prove such marriage, and within the discretion of the court, may be sufficient therefor."

Proof of this character is proof of the ceremonial marriage claimed by the parties; and this is the general rule in states where ceremonial marriage is required, as stated under the title of **"Marriage"** in **18 R. C. L. at Section 57** as follows:

> "The fact that statutes provide for record of marriage does not exclude evidence of habit and repute; **the record is not regarded as the best evidence.** The abstract probative force of habit and repute is not weakened by the fact that the statute provides evidence to prove the same situation. **And, therefore, even when a formal ceremony is required by law,** the law has wisely provided that marriage may be proved by general reputation, cohabitation and acknowledgement; **when these exist it will be inferred that a religious ceremony has taken place,** and this proof will not be invalidated because evidence cannot be obtained as to the time, place and manner of celebration of the marriage."

Such also is the Ohio rule as stated in Ohio Juris., Volume 26 "Marriage", Section 80:

> **"A ceremonial marriage may be proved by admissions of the parties, if no record is made, or if records are made, but are subsequently lost or destroyed. Such**

> **declarations and admissions** of the husband or wife are generally admissible, not as hearsay evidence, but as **original evidence of facts from which the marriage may be inferred**; such admissions may often establish a prima facie case, and are always admissible in evidence as tending to prove the fact of disputed marriage, and they have been held, in some civil cases, **to establish an estoppel where undenied.**"

It might be noted that if ever an **estoppel** was justified, it is justified in this case against these distant relatives claiming under an ancestor, who managed all the arrangements for the ceremonial marriage and made numerous statements to his immediate friends and associates of his marriage to the "richest woman in Columbus," and to whom she gave repeated gifts of money, and upon whose land she built with her own money an investment building at a cost of $52,000.

What the marital status of these parties was when Murnan died in May, 1937, was distinctly a question to be determined by Ohio law. They were life-long residents of Ohio, and lived as husband and wife for 22 years after the ceremonial marriage in Arizona, where they did not reside As this Honorable Court said in **Williams, et al. v. North Carolina,** 63 Supreme Court Reporter, page 207:

> "Each state **by virtue of its command over its domiciliaries and its large interest in the institution of marriage** can alter within its own borders the marriage status of the spouse domiciled there. * * *." (Syllabus 11.)

If the case stood alone upon the proceedings in Flagstaff, Arizona, and the parties separated thereafter, the proof of the invalidity of those proceedings would be controlling. Where, however, as here, the parties resided for

22 years in Ohio as husband and wife, declaring themselves and cohabiting as such, their status at the end of that time is to be determined by the law of Ohio.

In conclusion, we submit that there is no merit whatever in the petitioners' contention that the Court of Appeals failed, in the legal and constitutional sense, to give full faith and credit to the public acts and records of the state of Arizona. A finding that the ceremonial marriage in Arizona in 1915 was valid, was not necessary to the Court of Appeals' conclusion.

In addition, the petitioners wholly failed to prove the invalidity of the ceremonial marriage, because the defects claimed by them, namely, a lack of record and the presence of one witness at the ceremony, are not essential under the laws of Arizona to a valid ceremonial marriage, and because the ceremonial marriage was proved both by direct evidence and by a vast amount of other evidence which, under the statutes of Arizona, in force at the time of the marriage and of the trial, was competent for that purpose. They also wholly failed to disprove a common law marriage under the law of Ohio, based upon the intention and purpose of the parties to marry, as evidenced by the ceremony, and imputed tc their subsequent cohabitation in Ohio.

THE COURT OF APPEALS DID NOT DENY PETITIONERS "DUE PROCESS" BY FAILING TO MAKE NECESSARY FINDINGS OF FACT.

There is no merit whatever in the claim of petitioners that the Court of Appeals did not make the necessary findings of fact, as is apparent from the facts contained in "Statement of Case", supra. And what possible denial of "due process" can be claimed?

We refer to Appendix II, infra, for the findings of fact made on April 7, 1942, in the per curiam approved by Judges Barnes and Geiger. These are eighteen in number and nine relate to the question of the marriage. They cover all the "probative facts from which the ultimate facts can be inferred **as a matter of law.**"

The well settled Ohio rule is thus stated in Ohio Jurisprudence, Vol. 39, at page 1204, as follows

> "Section 459. Finding as to ultimate, as distinguished from evidentiary, facts.—When a party requests a separate written statement of the conclusions of fact and, as an aid to the court, submits special written interrogatories for such purpose, it is the duty of the court, as a part of its judgment, to make answer to all interrogatories involving **the ultimate facts of the controversy and to all involving probative facts from which the ultimate facts can be inferred as a matter of law.** However, in finding the facts separately from the law, the court is not to set out the evidence from which it adduces its conclusions of fact; on the contrary, when a finding of fact is requested, **the facts found must be the ultimate facts in issue.** * * *"

In not a single reported case was there such a complete coverage of the necessary facts. In the two cases cited by counsel (Produce Co. v. Dennert, 104 O. S., 149, and Levick v. Vonnell, 137 O. S., 453), the trial judges had refused to make any findings of fact.

We have the decision of the Court of Appeals that the findings were adequate, and of the Supreme Court of Ohio **that there was no denial of a substantial right** and **no prejudice. What possible denial of "due process" under the Fourteenth Amendment can be claimed, since these questions under an Ohio statute were decided by the highest state courts?**

It is apparent from the conduct of one or two counsel, after the decision of April 7, in bombarding the court with their "Professor Quiz" list of questions for several months, that their purpose was to create confusion. They do not refer to their first list of proposed findings submitted under Rule 9 of the Court of Appeals.

The Court of Appeals was more than considerate when it adopted the form of judgment entry with findings of fact submitted by petitioners. As stated supra, this entry included probative facts not necessary to the court's conclusion, such as a claimed illicit relationship between the parties prior to marriage and the description of the businesses in which they had been engaged at that time.

In this entry also, the petitioners attempted to jockey Judge Geiger into the position of finding common law marriage only, instead of his actual finding that the evidence was sufficient to prove either form of marriage, as stated in his original opinion and in the per curiam finding of facts of April 7 (Appendix II). To their words "this establishes a common law marriage between the parties" (Finding Eighteen), the court added the words "but might well corroborate a ceremonial marriage." In view of his concurrence in the original decision on the merits (Appendix I), and in the original findings of fact (Appendix II), there can be no question but that he adhered to his original opinion that the evidence was sufficient to prove either form of marriage.

We submit that petitioners were not denied any right under the statute, and that they were not legally prejudiced by any denial. Certainly there was no denial of "due process."

PETITIONERS WERE NOT DENIED DUE PROCESS BY THE DENIAL OF THEIR COLLATERAL ATTACK ON THE DIVORCE DECREE OF NOVEMBER 7, 1912.

(For a discussion of this divorce we refer to the Court of Appeals' opinion, Appendix I, page 48, infra.)

These distant relatives of M. P. Murnan claimed the right to attack in 1940 the divorce granted on November 7, 1912, to Grace Backenstoe Murnan from her first husband, George Backenstoe, by Judge Addams of the Court of Insolvency of Cuyahoga county, a court of record having the same general jurisdiction of divorce and alimony matters that the Common Pleas Court of Cuyahoga county had (**Addams, Judge, v. State, ex rel.**, 104 O. S., 475).

Respondents' Exhibit C (Vol. 4, p. Z-142) is an authenticated copy of the divorce decree, "finding service by publication upon the defendant, jurisdiction of the parties and subject matter, and that the plaintiff should be and was thereby divorced from the defendant, George Backenstoe, and restored to her maiden name of Grace Daugherty." (Court of Appeals' Finding No. 10.) As the Court of Appeals also found (Finding No. 11): "Thereafter no direct attack was made upon said decree, and no indirect attack, except in the evidence, but not by the pleadings, of this case after it was brought into this court."

The evidence offered by petitioners was in the form of a transcript of the papers then (1940) in the files of the Backenstoe case, including an affidavit for service by publication signed and sworn to by Mrs. Backenstoe before a **notary public, who had the same name as her attorney of record.** There was no attempt to identify the notary public

and the attorney as the same person, the matter resting entirely upon the similarity of names. As an Ohio statute directed that an attorney of record should not act as notary public for the particular affidavit, it is now claimed this irregularity made the decree void and that anyone could attack it at any time or place, even distant relatives of a deceased second husband after a period of 28 years.

The Court of Appeals in this case **unanimously held** (Appendix I) that the judgment was voidable only and could not be successfully attacked in this proceeding. They followed a unanimous decision by the Court of Appeals of Cuyahoga county upon identical facts, except that the former wife there made the collateral attack in a matter not involving her property rights, in the case of **Hudson, Admr., v. Owens,** 28 Ohio Law Reporter, p. 221, decided December 17, 1928, opinion by Judge Vickery. **This Honorable Court denied the petition for a writ of certiorari in that case (Owens v. Hudson, Admr.,** 280 U. S., 571), after the Ohio Supreme Court had overruled a motion to certify. (28 O. L. R., 475.)

We quote the syllabus of the Hudson case for the facts and the controlling part of the opinion, dealing with the distinction between void and voidable judgments.

Syllabus:

> "A resident of Cleveland, nine years before his death, on notice by publication procured a divorce from his wife with whom he had formerly lived in Georgia. Subsequently the wife appeared in Cleveland, and brought an action for alimony without asking that the decree of divorce be disturbed, and the court awarded her $1,000, which was paid. Following the death of the husband, an administrator was appointed for his estate, which the former wife caused to be set aside and letters issued to herself on the ground that she was the 'widow' of the decedent.

"**Held:** The conclusiveness of the decree of divorce was in no way questioned by the action of the Common Pleas Court in entertaining the wife's action for alimony, and could be challenged or reversed only by a direct action, brought within the prescribed time, asking that the divorce decree be set aside; and the former wife is now estopped from claiming the right to administer the estate of the decedent as his widow."

Opinion, page 224:

"Now it is claimed, and this must have been the theory upon which the lower courts decided as they did, that inasmuch as this woman had no actual notice and there was an irregularity in that the attorney for the plaintiff who filed the divorce petition verified the affidavit for publication, that the whole proceedings were void and the court had no power to do anything in regard to the matter; that every step was void, and they have quoted some authorities which would seem to indicate that. Unfortunately courts and lawyers and even text book writers have used the word 'void' when they simply meant 'voidable.' They have considered because the decision or contract might be avoided by a proper proceeding that it was, therefore, void. That does not follow. **There is a vast difference between a voidable judgment and a void judgment,** and it was nowhere more strongly illustrated than in the recent case decided by our Supreme Court, in cases taken up from this county and other counties which were heard together, **Tari v. State**, 117 O. S., 481, relative to the ineligibility of a justice of the peace to sit in a liquor case when he was to have a share of the fine and costs, it being claimed that, the justice being ineligible—basing the claim upon the **Tumey case**, 273 U. S., 510, which was decided by Justice Taft of the Supreme Court of the United States,—the judgment was absolutely void and, therefore, the ineligibility of the justice did not have to be challenged in the first instance. **The Supreme Court of Ohio held in Tari v. State, supra, however, as did Justice Taft in the Tumey case, that the question would have to be raised in a**

proper way; that it was a voidable judgment and n a void judgment."

The question in the Tumey (273 U. S., 510) and the Ta (117 O. S., 481) cases is almost identical with the que tion here. In those cases the justices of the peace, wh originally tried them, were disqualified by the Ohio sta ute which gave them an interest in the fines assessed, whi here the notary is disqualified by statute because he ha an interest as attorney for the party seeking the divorc

The conclusion of the Supreme Court of Ohio in the Ta case, based upon an extensive analysis of the opinion the Tumey case, is expressed in the syllabus, as follows:

"1. Interest of a judge in the decision of a cau pending before him disqualifies him from hearing an determining the cause.

"2. Such disqualification is waived unless objectio be made thereto at the earliest available opportunit and if known to the complaining party at or before th trial and if no objection be made in the trial cour will be deemed to be waived.

"3. **Interest of the trial judge does not render th judgment void, but merely voidable."**

At the time the Backenstoe decree was granted, Nover ber 7, 1912, the divorce decree itself was immutable und a long line of decisions by the Ohio Supreme Court, whic are reviewed in **Bay v. Bay**, 85 O. S., 417, the distinctio being drawn between the decree of divorce itself and th property rights involved, as is stated in the syllabus of th case.

Syllabus:

"Where a husband by fraud and false testimony ob tains a decree of divorce for the wife's aggression, an the decree also by reason of the wife's aggression, s found, bars her of alimony, dower and all other inte

> ests in the husband's property, **the decree dissolving the marriage relationship is conclusive**; but, when the court making such decree did not have jurisdiction of the wife's person, **she may thereafter have such decree and the issues opened up so far as they relate to her husband's property** and be let in to defend."

Subsequently, on January 1, 1913, the new constitutional provision became effective which provided for the review of every case tried in the Common Pleas Court by the Court of Appeals. It was held that this provision denied to the Legislature the power to deny appeal in divorce cases. (Zonars v. Zonars, 101 O. S., 518.) However, as the decree in this case was entered almost two months before, the right to a review was determined by the law at that time. It is also true that the change in public policy necessitated by this constitutional change was only modified to the extent made necessary by the constitutional provision, providing only for a **direct** review.

In **Beck v. Beck**, 45 O. A., 507, upon which appellants rely, the attack was direct and not collateral, a controlling argument with that court, as appears from the statement at the bottom of page 510:

> "This being a **direct attack** upon the judgment complained of * * * and **voidable** on the defendant's part."

Petitioners cite a recent decision of the Court of Appeals for Meigs county (In re Estate of Frankenburg, 70 O. A., 495), decided after the decision of the Court of Appeals in this case. In the divorce case there involved, **no affidavit** at all had been filed for service by publication, and in the case described the **property rights of the wife** were directly involved, both of which facts might well have influenced the court, especially in view of the distinction

long recognized in Ohio (**Bay v. Bay,** 85 O. S., 417) be tween the divorce decree itself and the decree concernin property rights of the defendant.

The holdings of the Court of Appeals of Cuyahoga count in the Hudson case and of the Court of Appeals of Frankli county in this case, were that **the divorce decree was no void, but voidable only, if attacked in due course by th defendant; that since each decree recites jurisdiction o the person and subject-matter, and was the decree of a court of record, it imported verity and was good agains collateral attack.** The holding in the Hudson case tha the decree of the Common Pleas Court of Cuyahoga count was good against collateral attack, is also conclusive as t the decree of the Insolvency Court of Cuyahoga county, be cause, as was held by the Supreme Court in a writ of pro hibition against the identical judge—Addams, Judge, v State, ex rel., 104 Ohio State, 475:

> "The Court of Insolvency of Cuyahoga county, i matters of divorce, alimony and the custody of mino children, is by statute granted the same jurisdictio as the Court of Common Pleas." (Syllabus I.)

In Ohio, as pointed out in Shroyer v. Richmond, 16 O. S 455, and particularly at pages 465-466, the question o whether the decree of a particular court imports absolut verity as against collateral attack, is not dependent upo whether that court is one of general jurisdiction, as mos of the courts of the state have their jurisdiction limited b Constitution or statute, but whether it is a court of record

> "But, as was said in the case of Sheldon v. Newton 3 O. S., 500, the distinction is not between courts o general and those of limited jurisdiction, but betwee **courts of record, that are so constituted as to be com petent to decide on their own jurisdiction, and to es tablish it to a final judgment, without setting fort**

> **the facts and evidence on which rendered, and whose records, when made, import absolute verity**; and those courts of an inferior grade * * *"

The chaos which would result in the settlement of family estates if distant relations, like these petitioners, were permitted to dig back into the files of old divorce cases to show some irregularity in the proceedings, and to contradict the findings of a court of record granting the decree, must be readily apparent to this court. We respectfully submit that these distant relatives, who had no property rights and no interest, direct or indirect, at the time the decree was granted in the Backenstoe case, have not been denied due process by the decision of the Court of Appeals in this case.

CONCLUSION.

When the true premises are known, there is no federal question in this case of any merit. For that reason it seems unnecessary to quote to this Honorable Court its decisions defining the "full faith and credit" and the "due process" clauses. The petitioners' own quotations are sufficient, if any are necessary.

There was no invasion of the "full faith and credit" provision of the Constitution in the finding by the Court of Appeals that Mr. and Mrs. Murnan were husband and wife on May 12, 1937, the date of his death, because:

1. They were life-long residents of Ohio, and the determination of their marriage status from their conduct and cohabitation during the 22 years following the 1915 ceremonial marriage in Arizona, is controlled by the law of Ohio; and

2. The ceremonial marriage itself was not invalid unde the laws of Arizona, and, even without the direct evidence was proved by three volumes of evidence declared com petent by the statutes of Arizona.

There was no denial of "due process" to the petitioner in the conduct of the trial and the judgment of the Court o Appeals, because:

A. The Court of Appeals had general jurisdiction of th subject-matter of this case, as well as of every other cas decided by a Common Pleas Court in its district, by virtu of the express provisions of the Constitution of Ohio, an its judgment herein was, therefore, not void;

B. The mode of trial prescribed by the statutes of Ohi is a question for decision by the Court of Appeals, and it decision thereof does not constitute a denial of "du process", because unfavorable to a litigant;

C. The petitioners chose their mode of trial by seekin equitable relief only, and securing that relief, namely, de crees in partition, quieting of title and accounting, in th Common Pleas Court, and waived thereby any claim to a action at law;

D. The trial of this case de novo in the Court of Appeal was in accordance with the settled law of Ohio for cause of action in partition and the quieting of title;

E. The Court of Appeals liberally accorded to petitioner their right under Ohio statutes to have findings of fact; an the determination of what was, or was not, a "probativ fact from which an ultimate fact may be inferred **as a ma ter of law"**, was for that court, and its conclusion thereo was not a denial of "due process";

F. The Backenstoe divorce decree of November, 191 was voidable, not void, because of the alleged irregularit

in the claimed disqualification of the notary public; and was not subject to collateral attack in 1940 by these distant relatives of a second husband, none of whom had any interest in the divorce case, direct or indirect, at the time of its decision.

We respectfully submit that the petition herein should be dismissed.

Respectfully submitted,

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Counsel for Respondents.